APPENDIX
VOLUME II

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,
Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,
Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

Appeals From The United States District Court For the Eastern District of Texas

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No. 77-1163 Filed February 16, 1978
No. 77-1164 Filed February 16, 1978
No. 77-1186 Filed February 21, 1978
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IN THE

SUPREME COURT OF THE UNITED STATES

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[In the United States District Court for
the Eastern District of Texas]

DEPOSITION OF DR. ROBERT K. SHANNON

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MR. NIEMANN: It is stipulated between Robert Keith, counsel for Dr. Nate Rogers and Dorothy Prengler, Assistant Attorney General, and Larry Niemann, attorney for Texas Optometric Association, that the TOA may intervene without objection from the office of the Attorney General, plaintiff intervenor, Texas Senior Citizens Association, Port Arthur Chapter --

MR. KEITH: Intervene as a party to this cause.

MR. NIEMANN: Intervene as a party to this cause, subject to the Court's approval of such intervention. The purpose of the intervention at this time from the standpoint of Texas Optometric Association is for the purpose of participating in the deposition of Dr. Robert Shannon and Dr. Nelson Waldman, there having been objection by counsel for plaintiff to the participation by counsel for TOA without such formal intervention.

MR. KEITH: You do propose that you will intervene in good faith and not just appear for these purposes and then drop out again?

MR. NIEMANN: Sure.

MR. KEITH: Then I have no objection to the intervention.

MR. NIEMANN: The intervention today will be followed by Pleadings filed with the Court.

MR. KEITH: That's fine. I have no objection. So stipulated.

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EXAMINATION BY MR. NIEMANN:

Q. Dr. Shannon, would you please state your full name and current address for the Court.

A. Robert K. Shannon, 119 Beachview Way, Bridgeport, Texas 76026.

Q. Are you a licensed optometrist?

A. Yes, I am.

Q. In what states?

A. Texas and Massachusetts.

Q. Are you a member of the Texas Optometric Association at this time?

A. Yes, sir.

Q. How long have you been a member?

A. Approximately four years.

Q. What is your present occupation?

A. I am an optometrist.

Q. Are you currently retired, or are you practicing?

A. I am for all practical purposes retired.

Q. Doctor, I would like to discuss simply a brief history of your practice and profession of optometry since your licensing. Can you begin by telling us in story form the high points of your practice and your participation in the commercial optometric chain in Texas and in other states in chronological sequence, just an overview.

A. I graduated from school in '38. I passed the Massachusetts Board shortly after graduation and went into practice at Natick, N-a-t-i-c-k, Massachusetts, where I had an exclusive office, did no advertising.

I went into the service, and while in service I took the Texas State Board examinations upon one of my returns from overseas duty, and was successful in passing it.

Upon being released from active service, I went into practice for an optometrist at Waco, Texas.

Q. About what year was this?

A. 1946, November, I believe. I worked for this Optometrist for approximately six months and purchased an office that was owned by Ellis Carp that was located a block or so away from where I had been working for this other optometrist. I changed the name of the office and went into private practice, and approximately a year later I formed a partnership with Dr. Carp.

Q. Dr. Ellis Carp?

A. Yes, Dr. Ellis Carp of Dallas, and we had this partnership in effect for the first time until either the latter part of 1956 or the early part of 1957.

Q. What names did the partnership operate under?

A. We operated under a number of names, Lee Optical being one, Shannon Optical another, Plains Optical.

Q. I will come back to this in a moment. Following your partnership with Dr. Carp and your practice of optometry under Lee Optical, Lee Optical and Plains Optical, what happened next?

A. I sold out my interest in the partnership in its entirety to Dr. Carp and moved to Arizona, and I went into the optical industry as an optician in Arizona, and I purchased from Dr. Carp the Arizona corporation that he had, which consisted only of one office. I conducted that business until approximately five years ago when I sold it in its entirety.

At that particular time it consisted of three offices and a wholesale laboratory all under a mother corporation called Optico Industries.

Upon the sale, completion of that sale, my family and I moved back to Texas. Approximately six months later I purchased the practice of Dr. John Herrin at Richardson, Texas, and that is the location of practice in which I am engaged at this particular time. However, I have sold the practice to Dr. Gerald Sparks, and for all practical purposes I am retiring out of the practice, but I am there on a consulting basis and do attempt to aid and assist him as necessary.

Q. Doctor, I would like to back up and talk about your partnership with Dr. Ellis Carp and get the details from you, if I may, more the specific details of your partnership and the manner in which you operated that partnership. Let me first ask you were there any other partners besides you and Dr. Carp?

A. Initially, no; later Dr. Stanley Pearle, P-e-a-r-l-e, became a partner in some of the offices that were opened after he became a part of the organization.

Q. When you say offices, were those combinations of -- what was done in a typical office that was owned by your partnership with Dr. Carp?

A. Some of the offices were located in a jewelry store, namely, the Zale's Jewelry Stores or Gordon's Jewelry Stores. Others were privately leased offices, space. In all, we hired optometrists, we advertised price, advertised credit terms and we operated under various names within the same city.

Q. For example?

A. For example, we could have a Lee Optical office, and we could have a Downtown Optical all within the same city. This was done at Waco, per se. In Houston we had similar offices. In Austin we had similar offices, San Antonio, Corpus Christi.

Q. Did they go under any other names other than Downtown Optical, Lee Optical and Shannon Optical and Plains Optical?

A. They may have, but I don't recall the names at the moment.

Q. Doctor, you mentioned that your partnership employed an optometrist in each of these offices. Could you give us the general nature of the staff of these offices, who hired them and who controlled the staff and the optometrists?

A. Well, for the most part the personnel were hired by me, and the auxiliary staff within the office would consist of as few people as we actually had to have in order to take care of the volume. We did not believe in overstaffing an office. The doctor of optometry was set up as the office manager, and all policies and procedures were given to him by me, and these emanated from the home office, which was governed by Dr. Carp and Dr. Pearle and myself, and Mr. Shaunbaum, who was employed as a business advisor, and later became a business manager for the Lee Optical Company.

Q. When you say office policies and procedures, would that include the day-to-day operations and procedures for handling patients from an administrative standpoint?

A. Yes. It took care of everything from the cleaning of the office to what frames were to be displayed in the window display, to what price we were to sell a particular frame for and what the glasses complete were to be charged to a patient. We handled all advertising. The doctors had nothing to do with advertising. They had no control in terms of business management. They were there to examine the patients and to take care of them to the best of their ability, but the prices and all fees and so forth were all handled, given to them by one of us, namely, in many cases it was by me.

Q. Is it fair to say that the optometrists employed by you in these offices exercised very little discretion with regard to office policies and procedures?

A. They weren't given any latitude. This was the way that it was, and it was done that way.

Q. So, control emanated from the home office?

A. Yes.

Q. In Dallas?

A. Yes. They were employed, right.

Q. When you say employed, does that mean that you had the right to terminate their employment at any time you so chose?

A. Yes, we could have.

Q. Did the optometrists own their own equipment?

A. No.

Q. Did the optometrists in your employ have discretion concerning what laboratory to use for lens fabrication?

A. In most cases, no; in a few remote cases the optometrists might be granted the right to use a local laboratory for some special work that had to be done for one reason or another, time factor usually being the most important, could not be handled by having the prescription processed through Dallas. For all practical purposes, all prescriptions went to one laboratory.

Q. Who owned that laboratory?

A. At that particular time, at the initial concept of this all, the bulk of our business was being done with Southwestern Optical, and it was owned by Mr. Bogart and a Mr. Greenberg. I don't know whether their wives participated, but they were the two that I know as owners.

Q. Did you eventually have your own laboratory?

A. Yes. I had no ownership in it, however, but a laboratory was formulated, and it was called Daltex Optical, and Mr. Greenberg became a part of it, and severed his relationships with Mr. Bogart. I became the laboratory manager for Daltex Optical.

Q. How about the other partners with you; did they have an interest in Daltex Optical?

A. Dr. Carp did, but Dr. Pearle, to the best of my knowledge, did not.

Q. Was it then required by your partnership with Dr. Carp and Dr. Pearle -- was it required by your

partnership that these doctors of optometry associated with the optical offices owned by your partnership, that they send their prescriptions to one particular laboratory?

A. Yes. It was Daltex Optical, again, with very few exceptions.

Q. Did the office policies laid down by your home office require that there be no appointments by patients, but rather a wait-in-the-lobby or wait-in-the-line type method of appointments?

A. Yes. We did not go on an appointment basis on any of our offices.

Q. Would you explain the reason why?

A. Patients were taken on a first come, first serve basis, and get them in and get them out as rapidly as we could was our policy. It's possible that a doctor might for some reason that I don't know, might say to a patient that "Well, come in at 4:00 o'clock in the afternoon and I will see you," but we are speaking in terms now of the multitude of people. We had a no-appointment basis set up. In fact, we advertised in our window no appointment necessary.

Q. In deed, Doctor, isn't a no-appointment basis more compatible with advertising than an appointment basis in practicing optometry?

A. Certainly. We were very interested in building a volume business. You can't do this on holding time for an appointment.;

Q. You had mentioned the word "volume" on several occasions, Doctor. Was volume necessary for your office to make a profit?

A. Yes. It's the only way we could survive.

Q. Was that because of the overhead cost of advertising and expensive lease space of the locations that you had?

A. It was general operating costs.

Q. So, volume was a sine qua non, so to speak, of your operation?

A. Definitely.

Q. In order to maintain that volume, it would not be possible if patients as a general rule are seen only by appointment?

MR. KEITH: I object to the question as leading.

Q. Would it be possible for you to maintain that volume --

A. I don't feel we could have possibly maintained the volume practice if we had set it up on an appointment basis. In most cases we had just a single doctor in there and an office, and when patients came in, we wanted them taken care of immediately, and in this manner if we got a backlog of patients, why, the doctors would be so advised that "You have got a backlog of patients. Come one. Let's try to hurry it up," and so on. If you do this on an appointment basis, you are automatically limiting the amount of people that can be taken care of in your office.

Q. Were the doctors under either expressed or implied instructions from the home office to examine patients and operate their office so as to prevent people from getting tired of waiting in the lobby and walking away?

A. Well, all doctors that I can recall of, all participated in a percentage of the total monthly cash sales as part of their earnings. This was told to them not once, but on many occasions. The more patients you saw, the more dollars that came into the office, the more earnings you are going to make. So this became the incentive rather than my going to the doctor and say, "Now, look, you are going to have to speed up your work," and so forth. He would do it automatically to see as many patients as he could because the more patients he saw, the more dollar bills that came into the cash register, the more earnings he would obtain.

Q. Were there ever contests between offices on patient volume or dollar volume?

A. Yes. We had inter-office rivalries, and the figures of one office would oftentimes be told to another office. The amount of patients seen by an office would oftentimes be told to another office as a means of trying to excite that second office to meet the volume that the previous or first office had had. Yes, this was done.

Q. Did your control extend to the setting of examination fees by the optometrists?

A. Yes.

Q. They had no discretion in this regard?

A. No. They had no discretion. They were told the examination fee, as I recall in those days, was three dollars.

Q. Did the control extend to requiring the office to purchase their frames and other ophthalmic materials --

A. Would you say that again?

Q. Did your control extend to requiring the particular optical office to purchase frames from a particular source or from an exclusive source?

A. The office itself didn't purchase any frames. The inventory was set up at the time the office was opened, and the people in that office, the doctor and people had no control over what inventory was going in there.

From time to time we would add inventory to it or we would take inventory from it, but the personnel themselves could not purchase frames except on a prescription basis, if you want to call as such, but here the office wasn't buying the frames; it was filling a prescription through our own laboratory.

Q. Was a certain portion of each office's income designated towards advertising?

A. Yes. We usually tried to set up a figure, and this was a figure that we would assume that the office would meet in terms of volume. We would set up five percent of the estimated volume of that office for advertising. Usually this was the amount. In some cases it would become more if the office volume did not come up to our expectations. Then more money would be put into advertising, far in excess of the five percent of its total monthly sales, in order to try to increase traffic flow.

In other offices where we had a high traffic flow, it is conceivable that the advertising budget could be cut back, but the overall figure was five percent, was abitrarily set up for advertising.

Q. To what extent did the local optometrist employed in a local office verify the lens prescriptions upon

their return from the laboratory to the local office?

A. In most cases he didn't verify them at all. People within the office on his staff did the verification. The optometrist himself was kept busy refracting, and when the work would come in from the laboratory, it would be for the most part inspected by one of the people in the office.

Q. Is this a lay person?

A. Yes.

Q. Generally speaking, would the optometrist verify lens if there was a complaint?

A. Yes. He would verify the spectacle correction at that time.

Q. Doctor, is the ordinary layman capable on their own of detecting most of the kinds of errors that are made in lens fabrication?

A. No. I would say you would have to have a trained individual to do this.

Q. So, verification only upon complaint -- would verification only upon complaint catch most of the errors that might be made in lens fabrication?

A. In most cases, yes. In most cases, yes, and some of the offices, we did have some well trained opticians, but in many other offices we had lay people that had no information whatsoever, background whatever of the optical industry. They would be put through a training program and would be shown how to handle the equipment to the best of their ability.

Q. If I understand you correct, you are saying that most of the errors could be caught by the lay persons in your office?

A. No, I don't say that is true. Some of the errors would be caught by the lay person. If they were a violent error, yes, they would probably be caught. If it was a small error that could cause some problems, the chances were that they would not have been able to have detected it.

Q. Doctor, is lens verification by a qualified person capable of detecting error an important part of optometric care?

A. Oh, certainly.

Q. In deed, Doctor, a correct examination and a correct writing of a prescription is useless if the lens prescription is filled incorrectly, is that not correct?

MR. KEITH: I object to the question.

A. Yes, that is correct. You can have the finest examination in the world, and you can write an excellent prescription, but if the prescription is not compounded correctly, the result is worthless.

Q. Let's talk about why the doctors in your local offices do not take the time to verify the lenses that were returned from the laboratory.

A. The reason for it is that in most cases our offices were busy, and we had one optometrist doing the work of maybe one and a half or two, and they were kept busy refracting. There is only so much time in the day, and if they are busy in refracting them, they don't have time to oversee the cleaning of an office or training of personnel or the verification of a pair of glasses or whatever other duties might come upon them.

Q. How were case histories taken in your offices, Doctor?

A. Usually, the patient would be seated in the examining chair, and the doctor would say, "What's your problem? How is your general health?"

The case histories would be taken by the doctor, but they would be a very short case history while he was doing the refracting.

Q. That is because of the pressure of time?

A. Yes.

Q. Was there a continuing personal relationship between the doctors of optometry and the patients at you local offices?

A. No. There was no -- for the most part, there was no personal relationship. The patient was an individual that had a service performed by a doctor, and as soon as that patient got out the doctor's door, another one came in. For the most part, the doctor would not recall that patient unless it was a most unusual circumstance that went along with it.

Q. You are saying, then, that the examining doctor did not know the patients by name or remember them by name?

A. That's correct.

Q. How about vice versa?

A. I would say the same. In most cases the patients were not introduced to the doctor in our offices. The patient would be told by one of the girls or one of the clerks in the office, "The doctor is ready for you. Come with me," and she in turn would take him or her into the examining room and say, "Please be seated. The doctor will be with you in just a moment."

Q. In what percentage of the new patient cases would the patient previously know the doctor by some --

MR. KEITH: I object to that question unless there is some basis to support the answer; otherwise, it's pure speculation.

A. It would be very low.

MR. KEITH: Let me finish. I object to the question as calling for a speculative answer unless he has some detailed information upon which he can base an answer as to what the patient would do before the patient arrived at some hypothetical office.

MR. NIEMANN: Are you finished with the objection?

MR. KEITH: Yes, sir, I am.

A. The only time a doctor would know -- or the patient would know the doctor, that I can recall, is when we employed a doctor who had been located in that particular locale, and we placed him into one of our offices located in that immediate area. This happened on very very infrequent occasions.

Q. How did the patients then come to your office?

A. Through advertising and through our locations, the attractiveness of our locations, through advertising.

Q. Contrasted to the personal reputation of the doctor of optometry?

A. Yes. I am sure that's true. We did not spend advertising money advertising the doctor. We spent advertising money advertising ourselves, the organization, Lee Optical or whatever the name was that we advertised under.

Q. Are you then saying that the patients coming to your office were there primarily through advertising efforts rather than through the reputation of the doctor for competency?

A. Yes, I would say that on the whole. They came because of advertising, I do believe. They came because maybe word of mouth. They came because of our location. It's conceivable that someone might say, "There's a good doctor down at" such and such office that we own. "I got my glasses or eye care there, and I would recommend for you to go there," but for the most part, that individual would not know the name of the doctor.

I, myself, had been mistaken many many times for the doctor who was normally at his office when I did vacation relief work.

Q. I would like to momentarily touch back on lens verification. What percentage of lenses that were shipped from your laboratory to the local offices were rejected or returned by the doctors or by the office for defects?

A. An extremely small percentage. I would estimate in those days less than one percent.

Q. How does that compare to your own personal history of rejects when you were practicing professionally in the later years?

A. I would estimate that our rejection rate in the past five years, four years, whatever the case may be that I have been at Richardson, it probably runs eight percent, seven to eight percent. So it's considerably higher than what it was.

Q. What, generally speaking, are the kinds of

laboratories you use or you have been using in your private practice, which was a professional practice, as I understand?

A. Yes. I practiced under my own name for the most part. For the most part it was restricted to contact lenses, so, therefore, the bulk of the service I get from the laboratories are contact lenses. In terms of spectacles, I have purchased some from Omega Optical, some from American Optical, some from Bausch and Lomb. My contact lenses for the most part are purchased from Custom Quality Contact Lens Laboratory in Dallas, and my rejection rate again is not high, but I think they know that if these lenses are inspected very minutely, if they are not made the way I want, they will be rejected.

But at least I maintain the quality control on the product, if that's what you are trying to lead me to or what me to say or not want me to say.

Q. I just want you to say the truth, Doctor.

A. I don't have somebody telling me, look, these check out at the laboratory level, and so, therefore, if they check out at the laboratory level, you have got to use them.

This is what I have had in the past. This is what I don't have now.

Q. Doctor, do the laboratories you use know that you verify your own lenses?

A. Yes, they sure do.

Q. From your past experience with independent laboratories, would you surmise that your rejection -- the percentage of lenses that should be rejected would even be greater if they knew you were not verifying your lenses?

MR. KEITH: That's purely speculative, and I object for that reason, as to what some third person would do if certain facts were true.

MR. NIEMANN: I am asking him to answer the question based on his experience as an owner of an optical laboratory and as a practicing optometrist doing business with optical laboratories over the past thirty years.

MR. KEITH: Which lab are you asking him to speculate whether they would or would not provide quality work if they did not check it; is it any particular lab?

MR. NIEMANN: Talking about all the labs he uses or has used in his practice of professional optometry.

MR. KEITH: I object for the reason that it calls for speculation.

Q. (By Mr. Niemann) Let's go ahead and answer, if you understand the question.

A. I think I understand your question. As an owner,past owner of an optical laboratory, you get to know your accounts over a period of time and you get to know the type of quality that a particular doctor insists upon having. Through telephone or personal conversations with the individual you have determined whether he personally is checking or whether one of the girls or some other individual in the office is checking the work, and common sense will tell you if a pair of glasses seem to check out fairly close and you think you can get away without having to make a new pair of lenses, you may be of a mind to go ahead and pass that job.

Q. Would that judgment be colored by whether or not

you knew the doctor was a real stickler for exactness?

A. Yes, of course.

Q. Or a little bit looser than normal?

A. Yes, absolutely so. That would be the basis for it, with the understanding -- and oftentimes we would call the doctor and say, "Doctor, we have checked this job and it's just a little bit out of tolerance, out of our accepted laboratory tolerances. If you would, why don't you try it, and if you have any patient repercussions or what have you, let us know and we will remake them for you immediately."

With other doctors, other accounts that we had, we knew that we couldn't do this, so it automatically meant we remade the job before we ever think in terms of sending it out or calling him.

With other accounts that we had, they could care less whether it met our laboratory standards for competence or not. So we at the laboratory level in many cases were setting forth the standards that the account had to accept.

Q. In you personal history does your rejection rate remain fairly constant whether you are dealing with Omega, Bausch and Lomb or American Optical?

A. I would say so, yes. I think all of the laboratories are trying to do the very best job they can possibly do, and they have personnel troubles just like anyone will have.

Q. Doctor, this is not out of the norm or unusual for there to be a certain percentage of rejections after lens verification by the examining doctor, is it?

A. No, not at all. Not at all.

Q. That's one of the primary purposes of lens verification, is it not?

A. Yes, certainly.

Q. That for the most part, are those persons who fabricate or grind the lens, are they licensed optometrists, to your knowledge?

A. The people that make the glasses?

Q. Yes.

A. No. They are lay people. They are lay people who are taught in my laboratory. They were put into a training program, and they were taught to do one particular phase of the making of a pair of glasses, and that's all they knew how to do, was operate that one machine or whatever the task was. If they felt they wanted to upgrade themselves, we did have a training program available for them that they could avail themselves of in their free time so that they could upgrade themselves and make more money by advancing to a more complicated task within the laboratory.

Q. Of this eight percent rejection rate that you estimated, Doctor, if you had not rejected those and had gone ahead and fitted your patients with those lenses, anyway, what percentage of those would you receive complaints on? Let me ask that question in another way. How many of those rejects would the normal patient be able to detect on his own, and thereby complain?

A. Some of them, they would have been able to have detected it immediately because we would have had a warped lens. I am speaking now of a contact lens.

Here we have a warped lens, and it would have given problems to the patient immediately.

We had other lenses that had too sharp an edge, other lenses that were too thin, other lenses that were too thick, other lenses that were off-color. Many of these things will immediately manifest themselves.

Q. To the patient himself?

A. To the patient, right, immediately. In some cases, again, you are speaking of patient tolerance. I have had many patients that unfortunately have gotten their lenses mixed up and put the left lens on the right eye and the right lens on the left eye.

Q. How about eyeglasses?

A. Well, eyeglasses, you are in a little different situation. The tolerance again depends upon the severity of the correction, the need for it. In most cases if a pair of glasses is not compounded correctly and it's just a slight degree out of tolerance, they could probably be accepted by the patient, and they may not give the visual comfort that they would like to have, but they are better than not having any at all.

Q. Would the patient really have any basis to judge whether or not it was a correct lens or not?

A. Only in terms of what they think their visual performance should be against actually what they are receiving. That would be the only judge, that and asking a person like yourself who wears glasses, "Well, can you see across the street?"

If he says, "Yes, I sure can. Well, I can't with these glasses," then there must be something wrong. But

they would still be better than none at all for them, possibly.

So it gave them some element of visual efficiency, but not the full degree they would like to have had.

Q. In other words, what the patient doesn't know, doesn't hurt him about defects?

A. Yes, that's correct.

Q. Doctor, would an incorrect eyeglass lens -- could an incorrect eyeglass lens prescription, either by error in the writing of the prescription or an error in the fabrication of the prescription, cause discomfort for the patient?

A. It's possible.

Q. Could that discomfort cause headaches?

A. It is possible, yes, it could.

Q. Would incorrect or would certain kind of incorrect prescriptions or incorrect fabrications interfere with the visual learning process?

A. Yes, definitely so.

Q. In fact, it could affect a person's school performance?

A. Yes, certainly. I feel this way: If you have a prescription, it should be made correctly. If it's made correctly, it should give maximum visual achievement to that person. It would be the same thing in essence of saying to you -- your physician says, "Mr. Niemann, take two aspirin," but you only take one. You are not getting the full prescription, so, therefore, you are not going to get the full benefit.

If you have a pair of spectacles that are made incorrectly, there are multiple conditions that could occur. If you have a situation where the distant visual achievement is not up to the level that it should be when a person is driving a car, it could endanger your life as a pedestrian crossing the street if that person happened to be in the vicinity. There are a multiplicity of conditions.

Q. Would it affect a person or adversely affect a person's work efficiency and work performance?

A. Yes, definitely. This is all part of the testing that one does in terms of industrial vision.

Q. Could an incorrect lens prescription or incorrect fabrication of lenses have an effect on a person's emotional wellbeing?

A. Certainly, yes.

Q. And thereby, his relationships with family?

A. It could.

Q. And friends?

A. It could. Especially this is true with contact lenses.

Q. Doctor, was your ownership in Lee Optical limited to any particular offices?

A. Yes. Yes, it was. I had ownership in offices only in Texas, and not in all the offices in Texas.

Q. For example, in your Lee Optical offices in Dallas, did you operate them on weekdays and Saturdays?

A. Yes. They were open six days a week, all day every day.

Q. Does this also hold true for your other offices?

A. Yes. All offices were opened six full days a week.

Q. Was Saturday your biggest day?

A. Yes, no question about it.

Q. Can you give us some idea of the number of patients that would be examined by one optometrist in a typical office on a Saturday?

MR. KEITH: I object unless he can identify the Saturday or the optometrist, the office or something.

A. Well, I could tell you this: The office was on East Grand, and the doctor's name was Dr. Elless, I had employed Dr. Elless. He came to us from California. I think his first Saturday he had, as I rightly recall, something like fifty-one or fifty-two patients he examined.

Q. In one day?

A. In one day, yes.

Q. Was this a very unusual day, or was this a typical Saturday?

A. This was more or less a typical Saturday at that office.

Q. Generally speaking did the same thing happen at other offices?

A. Yes.

Q. In Dallas?

A. And elsewhere, yes. We had a Dr. Northcross, Patrick Northcross, that was associated with us in

an office at Wichita Falls, and he would examine forty-five to fifty patients in a day. I have seen him do it not once, but many times.

Q. How about during the week?

A. During the week the volume in the offices would slow down, and it would build to a crescendo on Saturday. Saturday was our busy day, as all our advertising was beamed toward Saturday. We would do all our heavy radio advertising and all our heavy newspaper advertising, and later into television, all beamed for Saturday's business. We would do the bulk of our television advertising on a Friday evening. The same on newspaper advertising, would be in Friday's paper.

Q. Then are you saying that inherently when patients are derived through advertising, that your biggest day is Saturday?

A. Yes. We had found that to be true here in Texas.

Q. Why is that?

A. And certainly we found that true out in Arizona.

Q. Why is that?

A. Well, the average gentleman is not working on Saturday, so, therefore, it's a convenient time for him, or it gives him an opportunity to take care of the family while his wife has her eyes cared for or vice versa, as the case may be.

Q. Is that kind of high volume conducive to quality eye care, Doctor?

A. I don't think so.

Q. How many patients do you examine on a day in

which your calendar is full? Assuming that you are examining only for eyeglasses.

A. Well, I have run accurate tests on this. It takes me an average of approximately thirty-five minutes to run a refraction, a complete refraction. This takes care of my case history, and it takes care of the refraction and so forth on the average patient. This is not for contact lenses. My office hours are from 9:00 until 5:00, and my receptionist usually spaces these appointments an hour apart. This gives me an opportunity if I have to spend more time with a patient, I can do it. If I am able to take care of the patient to the best of my ability in less time than she has allocated, then it gives me an opportunity to have a rest period or to do some other work that needs to be done in the office.

Q. Are there situations where an examination will take longer than thirty-five minutes?

A. Certainly.

Q. Are there situations where an examination can take up to an hour or an hour and a half?

A. It's conceivable, although I, myself, don't allow this to happen. If I find that at the end of my examination I have findings that are not typing out as I feel they should, rather than to keep the patient there and to overtire them by making a repetition of a number of the tests within the overall examination, I will have them rescheduled back into my office at a later date. But the overall period of time that I might spend with that patient in just examining could conceivably be an hour and a half, but not at one time.

Q. Doctor, how did these special problems get handled

by your offices that were running a no-appointment, high-volume method of practice?

A. They were handled to the best of the ability of the individual refractionist. That's the only answer I can give. If he had complaints and couldn't solve them and so forth, then the patient would be referred elsewhere, usually to an ophthalmologist.

Q. Let's talk about the specific hours of the typical Lee Optical office that you were referring to earlier as having as many as forty-five or fifty patients on a Saturday. They open at 8:00?

A. They open at 9:00 in the morning.

Q. And closed at what time?

A. Closed at 5:00.

Q. Would the optometrist take off time for lunch?

A. No. In a case such as this, he would have one of the girls bring a sandwich into him or might possibly take a lunch from home and would attempt to eat the sandwich between patients or some such thing as that.

Q. Doctor, to the best of my arithmetic calculations, fifty patients divided by eight hours is approximately more than six patients per hour, and that's an average of ten minutes per patient, is that correct?

A. Yes.

Q. In your opinion is that a sufficient time frame within which to render a quality eye examination?

A. No, it is not.

Q. When a doctor is under compulsion to speed up his examination, is it true that he either has to cut short some aspects of the examination or eliminate come elements of the examination?

A. I am certain that's true, yes.

Q. Could we talk for a moment about the general steps or elements of an eye examination? Do you begin with the case history?

A. I do, yes.

Q. Do you next examine for pathology?

A. Yes. However, first I usually run a vision test, and then I examine for pathology.

Q. Does the vision test include refraction?

A. No. The refraction occurs after having done the elimination of the test for pathology.

Q. The outline as far as your particular procedure is --

A. Mine may be a little different from someone else's.

Q. Would you outline that for us, the major elements?

A. First is the case history, second is distant vision with or without their spectacles they are wearing, or contact lenses, as the case may be, and near vision with or without the contact lenses they may have or the spectacles, ophthalmoscopic or pathological examination, static retinoscopy, dynamic retinoscopy, subjective examination and distance habit phorias, distant and at near, induced phorias at distant and near.

I am trying to recall this. I do it automatically. Views cross cylinder examination at near, induced

phoria at near through the near prescription, measurements of the distance, the near distance, reading blood pressure, tonometry, color vision. That is the normal procedure that I use.

Q. Following that you exercise your judgment in determining the proper prescription in accordance with your findings?

A. Yes, for spectacles.

Q. Doctor, are prescriptions just an automatic computerized result of the findings from your refraction, or is professional judgment exercised in writing the prescription?

A. Professional judgment is exercised.

Q. Following that is there a step that would involve advice and consultation and instructions to the patient?

A. Certainly.

Q. Following that is there a lens verification procedure when they are returned from the laboratory?

A. Well, you are getting the cart before the horse. After you advise the patient of what you feel would be the best form of visual therapy for them, and assuming that it happens to be spectacles, in my office we advise them that they are welcome to a prescription or they are welcome to visit our frame display area. Possibly they can see a styling of frame that they would like, and if they don't we would be happy to give them a prescription. Assuming we fill the prescription in our office, the glasses then are ordered and come back from the laboratory, and they are verified.

After they have been verified and they meet our quality control, then and only then is the patient called to be advised that their spectacles are ready for them, and we set up an appointment time for them to be dispensed.

Q. If a doctor, as you have earlier testified, is averaging ten minutes per patient, where does he start cutting back on the time or the elements involved in these steps that you have just outlined?

A. He does only, or has done only what he had to do in order to come up with what he thought was a prescription that would satisfy the patient.

Q. You are talking about the doctor employed by your partnership?

A. Yes, that did this ten minute or less examination. Later the State Board adopted a provision in the chapter, which was the Basic Competency Act, which states that you must perform certain tests, but prior to that time you did whatever you wanted to do as an optometrist.

Q. Can you tell us how the adoption of the Basic Competency Rule changed the number of patients seen by one of your doctors?

A. Yes, It definitely slowed up the examination time because now the doctor had to perform so many tests within the overall examination in order to comply with the State law. If he didn't do this, then he was placing his license in jeopardy for a suspension or revocation.

Q. After the Basic Competency Rule was adopted -- let me back up for a moment. Did the owners of the optical chains such as yourself object or fight in any

way the adoption of the Basic Competency Rule by the Texas State Board of Optometry examiners?

A. I can't speak for other organizations, but for our own, we were not particularly in favor of it.

Q. For the very reason you stated?

A. Yes.

Q. It would slow you down?

A. It would slow us down.

Q. Once it was adopted, how much did it slow you down?

A. In my particular case, it slowed me down probably an additional five minutes. I don't know about the other doctors, but I can tell you that we were seeing less patients per given period of time after the adoption of that passage into the law than what had been seen prior to its passage.

Q. Well, you testified earlier that some of your offices were seeing as many as forth-five and fifty on a Saturday prior to the adoption of the Basic Competency Rule. After the Rule adoption, what would a typical volume be for one doctor in one of your offices on a Saturday?

A. Well, let me put it this way, that again, in the case of the East Grand office located in Dallas -- and this is specific -- on numerous occasions on Saturday I have gone to that office to examine patients that Dr. Elless was not able to examine because of the backlog of patients that we had, and so now there are two doctors in the office examining.

Q. Well, would you say --

A. I would say that Dr. Elless would probably have been able to see a third less patients, at least a third less, by following the Basic Competency Rule that what he had been able to see prior to its adoption.

Q. You would say that they were examining in the range of thirty to thirty-five patients?

A. Maximum.

Q. On a Saturday?

A. Yes.

Q. Rather than forty-five or fifty?

A. A single doctor.

Q. A single doctor?

A. Yes.

Q. Doctor, according to my calculations, a doctor seeing four patients per hour for eight hours would examine approximately thirty-two patients in a day. That leaves fifteen minutes per patient. In your opinion is that sufficient time to give a quality examination?

A. It isn't for me personally. For some other doctor, he might say that he can do a quality examination in fifteen minutes. I can't do it in that period of time, but I can tell you this, that when we had this pasage of this Basic Competency Act take place, we went into a heavy promotion within our offices in terms of creating sales by offering premiums and so forth on the sale of two pairs of glasses. So all of the personnel within the office were urged to sell two pairs of glasses to this patient rather than the single pair that heretofore had been supplied because

what occurred is that with the drop in the number of patients that we were seeing, so were we having a drop in our overall sales. The figure that we were interested in within the home office is primarily sales, and the theory was that if the sales were taken care of, the profit would take care of itself. So, in order to keep our sales volume up, we went into a programming where we stimulated the second pair plan, as it was called, and we would pay bonuses to the personnel in our offices who attempted to dispense a second pair of glasses to his patient. We would give the patient themselves a special price on the second pair of glasses, where the glasses would have cost them maybe five dollars less than what they normally would have cost were we able to fill that prescription for the second pair at the same time as the initial fitting of the first pair.

Of course, as far as the doctor was concerned, by keeping the sales volume up, his earnings were staying up there where they belonged because he was receiving in addition to his basic salary a percentage of the monthly cash received in that office.

Q. Was price advertising in the newspapers a major means of procuring patients when you were a partner in Lee Optical?

A. Initially advertising in the newspaper was the major market. Later it became television, but initially, yes, it was newspaper.

Q. Was price advertising heavily utilized?

A. Definitely. Every ad that we ran had a price ad in it. We tried to be lower than our competition.

Q. Do you have any knowledge of what percentage of

your total sales volume was represented by your advertised prices?

A. Approximately two percent.

Q. Does that mean ninety-eight percent of your sales volume was in excess of the advertised prices?

A. Yes.

Q. Why?

A. Because the frame selection was better, and we had sales people in the office that would suggest to the patient that they should have this frame, it looked nicer on them than the one that they could get at the advertised price, or they should have tinted lenses or whatever the case may be.

Q. Was the frame selection of the advertised low price less desirable?

A. No question about it. It was a frame styling that -- it was either a discontinued frame that was no longer being made by the manufacturer or it was a frame that for one reason or another we had elected to discontinue.

In any manner, it was certainly not a frame styling that would be one that a patient could say, "Gee, I got my glasses at Lee Optical and I only paid thirteen eighty-five," or whatever the case may be for them, " and I am very proud of them."

Whereas if they pay twenty-five dollars for them, then they could say, "I have got a Toura frame," or whatever the case may be, and could show some element of proudness that they had gotten a better quality product.

Q. Was the purpose of your price advertising -- was the primary purpose of your price advertising to inform the consumer or to entice him to come to your office?

A. To get him into our office, to increase volume.

Q. In other words, are you saying the price was used primarily as a lure?

A. As a lead.

Q. As a lead?

A. Yes, to get them into our office. In the days that we are speaking of, Mr. Niemann, many many people were advertising, and our advertising just had to be bigger and better or cheaper and lower or something, and this is what we were doing.

Q. You are saying you were doing the same thing the other competition was doing?

A. Certainly.

Q. Including TSO?

A. Yes. They were our major element of competition.

Q. Getting back to the quality of lens fabrication, when the wholesale laboratory, such as yourself, Daltex, had a locked-in source of customers such as your branch offices, did that in any way have any consequence on the quality of lens blanks that were purchased by your wholesale optical laboratory?

A. Yes. We used whatever they had available, and out at the individual office the doctor wouldn't know whether this was an American made lens or a foreign made lens. He wouldn't know whether it was a top quality American made product or a

second quality, or whatever the case might be.

Q. Do your doctors have the discretion to prescribe certain quality of lens blanks to be used?

A. No. They could only specify the type of prescription, but they did not specify the type of lenses, the manufacturers' names. They would specify the power of a lens. On occasion they would specify the type of bifocal or multi-focal that was to be used, and they would specify a tint, but as far as writing a complete prescription and specifying the type of lens and manufacturer, so forth, no, they had no control over that at all.

Q. Did your wholesale optical laboratory ever purchase lens blank second or inferior --

A. Mr. Niemann --

Q. Or not top of the line lens blanks?

A. Let me again emphasize I did not have an ownership in Daltex, but I was familiar with the inventory. When you are talking to this, are you speaking of Daltex?

Q. I am referring to Daltex, and I think we have understood each other as referring to Daltex, the wholesale optical laboratory from which the Lee Optical offices were locked in as a source of supply.

A. Lenses were purchased by Daltex at the best possible price that they could possibly be purchased. Many of your lens manufacturers for one reason or another will take a lens that does not meet the quality of their top line. Possibly it has a small scratch, maybe the multi-focal segment might be a little smaller or larger. There is some imperfection. Maybe it's a chip out here in the lens

or what have you. Rather than to throw that piece of glass away and take a complete loss on it, they repackage these occasionally,and in most cases they package them in a plain white envelope with no manufacturer's name on it, and these become available to anybody who wants to buy them. Certainly these were purchased by Daltex. I don't say every lens in Daltes was of that quality. I am saying yes, some of them were purchased by Daltex.

Q. Are these type seconds considerably cheaper than the first line quality lens blanks?

A. Certainly.

Q. Have there been any occasions in which Daltex bought old lenses or lenses that were lens blanks that were thinner than desirable or having some attribute that makes them normally unuseable for eyeglass lenses?

A. I recall one instance in particular where glass was purchased from Hudson Titmus, who at that time was the president and owner of Titmus Optical Company, and it was towards the end of the year, and Hudson Titmus had advised the personnel at Daltex that he had so many hundreds or thousands of pairs of lenses that he needed to dispose of for tax purposes, he had to convert his inventory into cash, and we bought what was known as a job lot. We meaning Daltex, and I helped sort some of this mess that was bought. We had some lenses that I am sure must have been made twenty-five years ago that were so small the only way we could have possibly used them would have been in a pair of children's spectacles, per se. Some of these lenses were of tints that were no longer being made.

We had many many lenses that were of a multi-focal variety that were for right eye only. We didn't have the matching half pair.

It gives you an example of what you get in a job lot. Yes, Daltex has purchased some job lots. This is one that I particular know of. Others I am not familiar with.

Q. Because there was no restraint by the examining doctor against the use of second quality lens blanks, was it more tempting for Daltex to use such kind of quality than if the doctor had had the ability to specify quality?

A. The motivating factor here at Daltex became profit.

Q. Not quality of the prescription?

A. Quality was secondary. The offices took what Daltex sent to them, and if the prescription was absolutely beyond all realm of reason, then and only then would it be remade, but more often than not, if it didn't meet the specifications of the examining doctor, he would speak with some of the laboratory personnel, and they would say, "Well, why don't you try them, and if it doesn't work, then have the patient come back and we will make them another pair of glasses," or something of that nature.

Q. Was quality also secondary to volume and profit in the local brach office of Lee Optical?

A. No. I would say that the average optometrist that I was familiar with was interested in building a successful future for himself. He came into the organization under that premise. At the time that we were building an organization, I think we turned out a very fine quality product. It wasn't

until later that the quality of the product deteriorated.

Q. When volume and profit became predominate?

A. Became paramount, right, that's true.

Q. Is that one of the reasons you severed your relationship with Dr. Carp?

A. Yes. The primary reason that I severed my relationship with him was that I just couldn't live with the situation that was going on. It was a condition that I could not control, and it was going from what I consider a bad to a worse condition. I had to face these doctors, and I had to try to advise them, "Well, tomorrow things may be better," and so forth. Finally got to the point where I realized there was no betterment that I could perform, and so the best thing for me to do --

Q. You are saying the doctors out of the branch offices would complain to you about the time pressures and the volume pressures they were under?

A. Yes, and the quality of the workmanship that was coming back from the laboratory. They would complain to me on such a thing, "I need another girl in this office."

I would say, "Well, let me see what we can do on that. Do you have someone in mind?"

And they say, "Yes, I do. It's going to cost a hundred dollars a week for the services of this girl."

In discussing it with Dr. Carp and with Mr. Shaunbaum, Mr. Shaunbaum would usually say, "I know it can't be done," or if you went ahead -- and in my particular case I made a commitment to the

doctor that such and such and so and so would be done, it was not abnormal for him to countermand this decision without my knowledge of it. This happened on a couple of occasions, and when it did, I at that particular time decided, "Well, it's time that one of us has to leave."

Q. Did these kind of restrictions and time pressures and volume pressures adversely affect the quality of eye care of the doctor of optometry in the local offices?

A. I think so, and to the point that I say it very definitely goes far beyond that. Not only did it affect the quality of eye care at that particular time, I think that the organization has lost many competent individuals that there was no need for them to have lost had conditions been as they initially were.

Q. When you say organization, you are talking about Lee Optical?

A. I am talking about Lee Optical organization, yes.

Q. In vernacular, were a lot of good doctors fed up?

A. Yes.

Q. Did they quit because of the time pressures?

A. Yes. Some of them went with competitive organizations, and some of them went into practice for themselves. But regardless of where they went, they did leave. Any time when you have a change, a heavy change of personnel, you don't have a good organization.

Q. Doctor, do you think that the time pressures and volume pressures of a commercial optometric

practice inherently and adversely affect quality eye care?

A. I think so, yes. No question about it.

Q. Are the time pressures and volume pressures increased by the cost and the timing of advertising?

A. Certainly. Somebody has got to pay for it, and the patient is going to be paying.

Q. Doctor, do you think there is a place for advertising in opticianry provided there is full disclosure and accuracy?

A. Yes, certainly.

Q. So you are not personally opposed to some form of control or regulated advertising by opticians?

A. Absolutely not. I am very much in favor of advertising.

Q. Are you familiar with the Texas statutes on advertising?

A. Yes, sir.

Q. Are you familiar with the provisions requiring full disclosure and accuracy and the threat of suspension or cancellation if there are violations of those standards?

A. Yes, I am familiar with them.

Q. Do you think it is a workable statute?

A. Extremely so.

Q. Do you think it is of benefit to the consumer?

A. Yes.

Q. Do you think the consumer would have less protection if by some means the statute was stricken either by legislative repeal or FTC ban?

A. Yes, definitely.

Q. I would like to discuss with you for a moment, Doctor, the subject of inherent dangers in advertising eyeglasses. Is advertising eyeglasses like advertising a pair of shoes for sale?

A. No, I wouldn't say so. A pair of shoes, at least you can see what you are getting. With a pair of glasses, you can't. You are getting an item that the average consumer is not familiar with.

Q. Is the optical product, namely eyeglasses, a non-standardized type commodity?

A. What is the meaning of non-standardized?

Q. In other words, different lens categories, things that have qualities that the consumer cannot detect by his own examination.

A. Yes.

Q. Are those two qualities, namely the difference in categories and qualities that cannot be seen or detected by the consumer, what sets apart eyeglasses from many different types of advertised products?

A. Yes.

Q. Would the public normally be aware that differences in eyeglass quality and eyeglass cost could be caused by differences in quality of lens blanks?

A. Yes.

Q. Or plastic versus glass lenses?

A. Possibly there, but, again, it's probable.

Q. Or transmission qualities such as color tint, color distortion?

A. It's questionable, again. The average individual buying a pair of glasses doesn't specify to you that they want a particular quality of lens. They just assume they are going to be given a top quality item just as if they went to the pharmacist and they asked for a prescription to be compounded, they wouldn't ask for a second quality drug, they would assume that it's going to be of a top quality thing. In pharmacy you have the Federal Drug Administration overseeing the manufacturing of your drugs. In the optical industry the supplier is the one who controls the quality of the finished product. If a doctor per se orders a product made by a particular company, he has ways of determining as to whether or not that lens has been made by that company, or he can look at a frame and determine as to whether it's the frame that has been made by the manufacturer that he has specified, but these are unknowns to the consumer, and the word "first quality" meant nothing in many states. Here in Texas we have -- I think the Optometry Board is to be congratulated in specifying that there are certain standards that one must use in specifying quality. I think if we have something of this nature, there is no problem.

Q. One advertising price --

A. Yes.

Q. -- is the Z.80?

A. This is what I am referring to. If we had some

specified control throughout the country, I think that the patients would not be bilked.

Q. In view of all these variables and differences and lack of uniformities, how meaningful is it to advertise a single vision pair of glasses for fourteen ninety-five?

A. It's the means of getting an individual into your office door that you might not be able to have gotten in otherwise. That's what it means to that particular individual who owns that operation.

Q. Then it's meaningful as a means of getting them into the office, but is it meaningful by way of educating the public on all these variables and what they are really getting for their dollars?

A. No. It doesn't mean a thing. In my opinion it doesn't mean a thing.

Q. Now, Doctor, if there is advertising by the optometrist himself, assuming that the optometrist is his own boss and owns completely his own practice, does that advertising result in increased overhead costs?

A. Yes.

Q. In order to meet that increased cost, must there be either an increase in his charges or an increase in his volume of patients?

A. Yes, I would think so.

Q. Then is it a fair conclusion that advertising will cause either one of those two pressures on the doctor, increased overhead or increased volume?

A. Yes.

Q. When there is pressure for volume, you get into the -- do you get into the same kind of pressures that you have described as being on the optometrist practicing in the Lee Optical offices?

A. Yes. We find ourselves in Arizona with offices that we were just opening, and we would set up advertising budgets, and it's conceivable that that office operated at a loss for -- it might be three months, might be six months, might be a shorter or longer period of time.

Q. Let's talk for a moment about your departure from Texas and entry into Arizona.

A. All right.

Q. About what time did you terminate your relationship with Ellis Carp and the Texas offices of Lee Optical and the other names under which you went?

A. It was either the latter part of 1956 or the early part of '57. I have forgotten the exact date that the termination of the partnership agreement took place, but it was at that particular time.

Q. Did you totally sell out to Dr. Carp?

A. Yes, I did. I sold all interest to Dr. Ellis Carp.

Q. Then what did you do?

A. I retired, and we moved to Arizona. I remained retired for approximately six months. I went back into the optical industry. I had indebtednesses due and owing to me from Dr. Carp, and in order to get these resolved without formality of lawsuits and other problems, I purchased from him the optical corporation that he had in Arizona, which consisted

of one office only and a name, and I agreed to take from him the remainder of money that was due and owing to me in merchandise over the ensuing, I believe it was, two years, whereby I could specify to him and to Daltex laboratories that merchandise that I wanted, and they would obtain it and send it to me. With that I went back into the optical industry, but this time as an optician. I built offices and operated them strictly as a non-price opticianry establishments.

Q. Under what name and about how many offices?

A. Under the name of Lee Optical of Arizona, Incorporated. At this particular time we had, I believe, four offices. When Mr. Shaunbaum and possibly Dr. Carp -- I don't know -- decided to engage in business in Arizona, they came in with a price policy, and when they came in with a price policy, many of us met their price programming with a price policy of our own. When I say many, I am speaking in terms of the other opticians out there. We found that with the advent of price advertising that we were able to increase our volume tremendously. We were able to get more and more patients into the office through price, and this is what we did, and price became an integral part of our operation. At the time when I sold it, they were still advertising price.

Q. Were there optometrists employed in your Arizona offices?

A. No, sir.

Q. Were they next door?

A. They could be located next door or could be located half a block away. They were convenient. Let me

put it this way: They were convenient to our opticianry establishments, but not necessarily next door in all cases.

Q. Did you have any employment agreements with these doctors or lease agreements or partnership agreements or this kind of thing?

A. The only agreements that we ever had with the optometrists was that of a lessee/lessor arrangement, and in some cases we would obtain a lease for them and would lease that space to them, depending upon whether they had equipment or furniture -- depending upon whether we would furnish and equip the office. If we went to that extent, then naturally they paid more rent.

Q. Were those doctors and did those doctors rely for the most part for patients via their physical proximity to your opticianry or referral from your opticianry?

A. Yes. The Arizona statutes at that time were that when a patient asked you as an optician, "Where should I have my eyes examined," or what have you, you were bound and obligated to advise them of at least three doctors that were conveniently located to your establishment. I think the statutes were within five miles. This we would do and would say, "We have Doctor" so and so "located just two doors away. He has examined many of the patients for whom prescriptions we have filled, and apparently he's very competent."

Q. So, in response to the advertisements, the people would come to your opticianry?

A. Yes.

Q. Of course, you could not fill a prescription unless they had been examined first, correct?

A. We could fill a prescription only in the event they had a prescription. If they had a pair of glasses and they wanted a duplication of those glasses, we could do that. They did not have to have their eyes reexamined in order for us to make another pair of glasses for them, but assuming, now, that you have a patient coming if off the street that wishes to have their eyes examined, then we would have to have a prescription given to us before we could fill them.

Q. As a part of your lease agreements with the nearby optometrists or your equipment rental agreements, to what extent did you control their method of practice or their office procedures or the general conduct of their optometry?

MR. KEITH: Larry, I object to the question unless it has some relevance to the issues in this case. If it does, I am perfectly content to going on into the night. What occurred in Arizona I don't see has any relevance to the Texas Act or is under challenge here.

MR. NIEMANN: Are you through with your objection?

MR. KEITH: Yes, sir, I am. I think it's unfair to the Court or parties to drag it out unless it has some connection with this case.

MR. NIEMANN: The relevance is that it is entirely possible that the same type of operation can occur in Texas under the Texas statutes, and I am inquiring about the nature of his Arizona operation because it could legally under the statutes in Texas be repeated in Texas, and because of that relevancy, I ask you to answer the question.

MR. KEITH: I object because I have no idea what

the Arizona law is, but I don't believe it's like the Texas law.

THE WITNESS: We did not control the mode of practice of the optometrists other than to specify in our leasing agreement with him the hours that he was to maintain the office to be opened, the days of the week. That was the only --

Q. As a practical matter, do any of the doctors with whom you had lease agreements exclusively practice by the appointment method?

A. Many of them tried to, and on the slower days they could, but on Saturday, they did not carry appointments.

Q. Are you then saying that if the doctor of optometry relied indirectly for patients through the advertising of the optician, then there was a certain mode of practice that was dictated?

A. Yes. Indirectly, yes.

Q. The waiting line type method?

A. Yes.

Q. And the high volume practice?

A. Yes, sir.

Q. Then did some of the disadvantages -- did some of the time pressures and high volume pressures that existed in the Lee Optical practice in Texas, were some of those repeated in Arizona, not by you, but by the doctors that were nearby?

A. On occasion, yes, we would have a patient, say, "Gee, I have never had my eyes examined in such a

hurry," or such things as that. We would say to them that, "Well, he has examined a number of people whom we have served, and apparently he is very competent. If you are experiencing difficulty with your glasses at a later date, don't hesitate to let us know or call him and I am sure he will take care of it."

You try to make some kind of amends, even though you weren't directly involved. You were indirectly involved because in a sense you had recommended this doctor as being one of three or four to that individual.

Q. Are you familiar with a Dr. Shropshire?

A. Yes, sir.

Q. What is his full name and what is his relationship to Lee Optical now?

A. Charles T. Shropshire is the full name, and I believe he is in charge of acquiring optometrists and leasing offices in Texas.

Q. To your knowledge was Dr. Shropshire associated in some manner with Lee Optical in 1961?

A. To the best of my knowledge Dr. Shropshire has been with Lee Optical since 1946 or 1947. I have never known of him to be with any association other than with Lee Optical. At one time he had a partnership with Dr. Carp in an office in Amarillo, and that office was canceled, and then he became an employee of Dr. Carp.

Q. During your association with Dr. Carp and Dr. Shropshire at Lee Optical, do you ever recall instructions from the home office to the doctors in the branch offices regarding prescriptions or

certain kinds of lenses which they could or could not prescribe because of inventory problems of the home office or the laboratory?

A. I recall of requests. I don't know whether they were all in writing, but word was given to these doctors to attempt to prescribe lenses of certain tints because Daltex had an overabundancy of them. I also recall of notices going out, and again I don't recall whether they were all in writing, pertaining to frames, that there was overabundancy of this particular styling or coloring of frame, and to do all in their power to attempt to dispense them. In particular I am referring to some Toura frames -- very good. I recall those.

Q. Do you ever recall instructions issued by Dr. Shropshire or Dr. Elless similar to the following instructions: "Trifocals, executive bifocals, lenticulars, etcetera, should not be prescribed or fitted even if a patient is willing to pay more for such. Do not charge more than the advertised price under any circumstance."

A. I don't recall any notice of that nature going out, no.

Q. Do you recall any other instances in which the home office would attempt to steer a doctor toward or away from certain kinds or categories of lenses?

A. Yes. As the organization built, we developed a chain of command. Primarily my role within the organization dealt in personnel. Dr. Pearle was primarily in advertising. Dr. Carp remained at the home office, and Mr. Shaunbaum handled general matters of business.

As our development occurred, we developed individuals or acquired individuals who became

area supervisors, and these area supervisors were all optometrists and were brought in periodically to the home office, and at such time were advised that the laboratory had made a special purchase of such and such, and that they were to get out into their offices and attempt to stimulate sales on those items in particular.

If any change in policy was to take place, such as giving an added bonus for the selling of a particular styling of frame, more often as not, it would occur at the supervisory meetings, so when the supervisor left that home office and went back to the offices under his control, he was then able to correspond with the doctors in that office or doctor, as the case may be, and say, "This is what took place when I was at Dallas. Effective as of today we are going to give everyone in the office a twenty-five cent bonus when they sell a frame of this particular color, style or manufacture until our supply is exhausted. In addition, you are to do all in your power to dispense a particular color or style of lens."

The only thing that I recall in terms of lenses vividly is that we were experiencing difficulty making the executive -- making a prescription in the executive bifocal, and we were having tremendous breakages with the laboratory. At one of the supervisory meetings, it was asked of the supervisors to advise the doctors under their jurisdiction to curtail the recommendation of the utilization of the executive bifocal, but I don't ever recall the order coming out and saying, "Don't accept it or don't prescribe it."

Q. Doctor, on the basis of your previous experience as an owner of an optical chain with and without employed optometrists and on the basis of your familiarity with the Texas optometry advertising

statutes, do you have an opinion concerning whether the Texas advertising statute increases the quality of eye care by the opticians and optometrists that advertise?

A. I very definitely feel that the optometry law benefits the patient in this regard, yes.

Q. Does the law which forces full disclosure and accuracy and which has the enforcement powers that speak for themselves, tend to upgrade the quality of eye care by those opticians who advertise and those optometrists who either advertise or gain their patients through the opticians advertising?

A. Mr. Niemann, I don't know about the quality of eye care because the optician can't provide eye care, but he can provide an eye quality to a pair of glasses.

Q. That's what I am referring to.

A. Is that what you are referring to? Yes, I think the overall statute in Texas is one that would be well to be adopted throughout the entire country. I think it's an excellent statute.

Q. Instead of combining both in the same question, let me re-ask the question. Does the Texas statute tend to upgrade the quality of ophthalmic materials or lens prescriptions dispensed by opticians who advertise?

A. Yes, sir. Yes, sir.

Q. Does it similarly upgrade the quality of eye care rendered by optometrists who may advertise or by optometrists who are somehow benefiting from the advertising of associated opticians?

A. Well, I would think so. My personal opinion, I don't

know of any optometrists that are advertising, but if they did, I assume they would come in under the statute, but for the ones I know of, I think they are all quality conscious, and having these standards set forth, looking at it as a former owner of a wholesale establishment, it is ridiculous for me to carry two inventories of glass, one a top quality and one of a substandard quality when I know I can only use one quality in filling a prescription for a Texas licensee.

Q. Therefore, quality increases?

A. Therefore, quality is going to be bettered. There is no question about it.

Q. Do you know of any harm that the consumer suffers by virtue of the full disclosure and accuracy requirements of the Texas advertising statute?

A. No.

Q. Is the consumer better educated regarding the different categories of lenses if price advertising is done via the requirements of the Texas advertising statute?

A. I would think so.

Q. Does the advertising statute in Texas prevent the consumer from being tricked or lured into the opticianry assuming that he can get the glasses for a specified lower price?

MR. KEITH: I object to the question as calling for a statement of the law.

MS. PRENGLER: What was the question?

MR. KEITH: Does advertising prevent consumers from being tricked by essentially bait

advertising?

THE WITNESS: That isn't how he worded it.

MR. NIEMANN: Even if I asked that, I may still ask it.

COURT REPORTER: "Question: Does the advertising statute in Texas prevent the consumer from being tricked or lured into the opticianry assuming that he can get the glasses for a specified lower price?"

MR. NIEMANN: I still ask the question.

A. As I understand the statute --

MR. KEITH: That's my objection, that it calls for a construction of the statute.

MR. NIEMANN: I am not asking for a legal construction of the statute, counsel. I am asking for a practical effect of the statute from one who knows how a commercial opticianry operates and what the public's reaction is to advertising on the basis of use of experience.

Please go ahead and answer the question.

A. Yes, I understand the Statute. An optician that advertises must post his advertising price, his advertised prices with the Optometry Board, get an advertising permit from the Optometry Board before he can ever advertise, and then when he does --

MR. KEITH: Price.

Q. Price?

A. Yes. I am speaking of price now. Once this price

advertising does take effect, he must have these prices that he has given to the Optometry Board posted within his office so that his clients are able to readily identify the price quoted to a product.

Q. Well, I am speaking particularly to the part of the advertising statute which requires that in any advertising of price, that the price for all the statutory lens categories be listed, to-wit: Single vision, kryptok bifocal, regular bifocal, trifocal, aphakic, prism, double segment bifocal, subnormal vision and contact lenses?

A. What was your question?

Q. Will the required listing of those categories and the prices for those categories in any advertising have the practical effect of better informing the consumer of what he is in for when he goes into an optical office?

A. Yes, it certainly is a lot better than just advertising glasses as low as thirteen eighty-five or whatever the price may be. At least you are specifying a definite type of spectacle for a definite fee.

Q. I am asking if the statute in your opinion has the practical effect of accomplishing the purpose of informing the public.

A. I believe it does, yes. I think that the public can at least be informed that one type of spectacle will cost so much if they have a single vision lens. If it's going to be a bifocal of a particular type, then they will pay more for it. Yes, I think that will inform them.

Q. In the practice of optometry where the optometrist is his own boss and relies on his reputation for competence rather than advertising as a source of patients, does the optometrist serve as a buffer

against the mistakes of the optical laboratory?

A. Certainly. It's his responsibility to examine each pair of glasses that come into his office and to determine whether they meet his specifications.

Q. Is this protection or buffer for the consumer's protection diminished when that optometrist becomes under the employ of the opticianry furnishing and fabricating the lenses?

A. I think so. In many cases what occurs with a prescription that I or any other optometrist can write, we give to the patient and we advise them, "Get this prescription filled wherever you may, and prior to wearing them, please bring them back to our office for verification."

There is no way we can demand that patient to come back, so, therefore, we have no control over the quality or the manufacture of how well or how poorly the product was made.

Q. The point I am getting at, if the opticianry that is locked into a laboratory or which is owned by a laboratory, if they are the source of the optometrist's patients, isn't that optometrist more relunctant to act as a buffer against the mistakes of the opticianry or the wholesale laboratory?

MR. KEITH: Purely speculative, and I object for that reason.

Q. State your answer on the basis of your history as an owner of an opticianry and your close association with an optical laboratory.

A. I would say yes, that he would be more relunctant to act as a buffer, certainly.

MR. NIEMANN: That's all the questions I have for the moment.

MS. PRENGLER: I only have a few.

EXAMINATION BY MS. PRENGLER:

Q. Dr. Shannon, when you came back from Arizona to come to Texas, did you have any job offers or job opportunities at that time?

A. Yes.

Q. Will you tell us about them?

A. Many of them.

Q. The types of job offers that you had?

A. Well, I had a number of opportunities to go to work with salaries as much as thirty thousand dollars offered to me.

Q. Did you have a job offer from Dr. Rogers?

A. Yes.

Q. Did you accept that offer?

A. No.

Q. Why not?

A. Well, at the time I truthfully didn't know what I wanted to do. I had two, I believe, telephone conversations with Dr. Rogers which were very pleasant, renewing our friendship and so forth. He spoke in terms of what did I want to do, and I said, "Truthfully I don't know what I want to do."

He said, "Well, how would you like to do some vacation relief work?"

I said, "Well, that sounds interesting. I will certainly think about it."

I was thinking about it, and I received a telephone call from one of his representatives by the name of Dr. Charles McClintock. When this telephone call came in, that stopped all of my future thoughts in terms of any association I might have with Dr. Rogers, vacation relief work or anything else. I wanted no part of his organization with Dr. McClintock. A shorter period of time thereafter, possibly within a week or thereabouts, I purchased the practice of Dr. John Herrin at Richardson.

Q. Throughout the years how would you classify your relationship with Dr. Rogers; has it been hostile or friendly?

A. Oh, it's been friendly. I have no animosity towards him, and I know of none that he has towards me.

Q. Dr. Shannon, as an optometrist, what problems or interests do you expect the members of the Texas Optometry Board to be concerned with? What types of problems do you think as a Board they should be concerned with and interest in the sense of public interest or private interest?

A. First and foremost, I think a State Board member has a prime duty to examine candidates and to pass those that they feel are successful in completing their requirements for licensing. That's number one.

Number two, I think their role is to uphold the enforcement of the Optometry Act to the best of

their abilities, and it is there that I think their duty should stop.

Q. Could you sort of briefly tell what type of qualities that you think a Board member whould have just as a person, to be a good Board member?

A. Well, I think he should be a non-biased individual and have no prejudices toward any race, color or creed. I think he should be learned certainly in that aspect of work that he is performing as a State Board member. Certainly should be extremely knowledgeable of the statutes and as an examiner of a particular phase of the examination, he certainly should be one of the leading educators or advocates of knowledge in that field. I feel that he should hold no powers beyond that which have been granted to him by the governor and through the Senate, his appointment.

Q. Do you think that he should put the interest of the public before any private interest that he may have?

A. Without a question, certainly. He is, as far as I am concerned, a servant of the public.

Q. Okay. Keeping all that in mind that you have just stated, do you have an opinion as to whether or not you personally would make a better Board member now as opposed to when you were part owner in Lee Optical?

A. There's no question but what if the opportunity were presented to me and I wished to accept it, that I would be a far better State Board member today than what I would have been twenty years or more ago because now the interest that I have would be strictly for optometry and for the public, where twenty years ago I would have been interested in

trying to get men through the State Board, possibly become employees of mine, and I would have had my business interest probably foremost.

Q. And the temptation to take advantage of that would have been greater then than any sort of temptation at the present time, since you are self-employed?

A. No question about it, sure.

Q. If an optometrist who was in your employment at the time that you were part owner in Lee Optical were on the Texas Optometry Board, would you expect that person to look out for the interest of Lee Optical?

A. You bet.

Q. If that person who was in your employment voted against what you considered to be the best interest of Lee Optical, what would you do about it?

A. I would have a very frank talk with him and try to advise him of what side of the bread he puts the butter on because, in essence, I am paying his salary.

Q. If he didn't eventually come around to what you considered was voting for the best interest of Lee Optical, what would you do; would you fire him?

A. I am sure I probably would, yes.

Q. Okay, you talked to --

A. Let me -- if I didn't fire him, I would make it very unpleasant for him so that he would terminate.

Q. You talked earlier about some of the instances of price advertising that you personally knew about

before you left to go to Arizona. Can you go into a little more detail about the different methods that were used to advertise price?

A. Primarily we used three media. We used initially newspaper heavily, and we supplemented it with radio spots. When television came in, we then augmented our programming into some television. As television became more accepted, the trend changed from newspaper advertising into more television advertising, and it finally got to the point where we were using no radio at all and were using telephone -- I mean television and newspaper exclusively.

In all cases we advertised price and we advertised glasses "as low as", and it could be nine fifty, it could be ten fifty, whatever the pricing might be. The pricing was set in terms of what was our competition doing in that particular area, and we attempted to set our advertising at a lower price than what our competition was advertising at.

If we didn't have any competition that was advertising price, we then would use our basic format, which might be the advertising pricing that was used in Dallas. We also used credit. We would advertise "use your credit," or "convenient credit terms; pay as little as a dollar a week."

In all cases the glasses were advertised "as low as." In the very latter stages of the time when I was associated with Lee Optical, Dr. Luck's operation was purchased, and our advertising was modified for that, and it became a one-price operation. So, other than that, it was all "as low as."

In many cases, to stimulate people to come into an office when we were opening an office, or if the

volume wasn't up to our expectations, we would give gifts. "Get a pair of glasses and you get a free set of dishes," or you would be given a slip that entitled you to have a free photograph, you and your family, some type of inducement, in addition to just coming into our office because of price alone.

Q. Did you ever use any type of leafletting, coupons, anything along that line to get people?

A. Yes, we sure did. We had leaflets printed. I vividly recall in Texarkana that stated in effect that this leaflet was worth three dollars. If you took it to your office, this would entitle you to a free eye examination. If you didn't need glasses, it wouldn't cost you anything at all. You would give them this leaflet.

Q. What would happen when the people would come in with these coupons; were they redeemed, and did you follow up on what you had promised?

A. Yes, we sure did. In essence, what it boiled down to is that we gave a free eye examination. There are very few people, as I recall it, that weren't prescribed to.

Q. Do you personally know of any situation when you were with Lee Optical when there was a particular optometrist who regularly did not prescribe glasses who was called down about it?

A. Yes, I do. The word "called down," though is not correct. He was spoken to and was told that we just couldn't understand how he could examine so many people and not prescribe, that the percentage of not prescribing from his office was far far in excess of what the average was in all other offices, and at that time we would have a frank discussion with that

doctor, and usually it would cause the volume of that office to increase after we had spoken with him.

Q. Do you know about what percentage of people who came to Lee Optical during the time there was price advertising actually paid the price for the glasses that was advertised or drew them into that particular office?

A. About two percent of them, as I recall. About two percent of our total volume of sales were at our advertised price.

Q. Is that just a guess on your part?

A. No. These are figures that I recall.

Q. Would you go over real briefly again the reasons why you decided to sell out your interest in Lee Optical?

A. In my personal case, I just felt that an element of degradation was taking place that I could not control. I had made promises to these doctors and to personnel, and finding that my word was being countermanded, I had a situation that was most unpleasant, and I was not able to correct it. It was necessary that one of two things take place, either that I buy Dr. Carp out or Dr. Carp were to buy me out. It so happened that he bought my interest.

Q. Did you discuss these problems and the degradation that you felt was taking place with the other two owners?

A. Yes, with Dr. Carp and Dr. Pearle, certainly. In fact, Dr. Pearle left the organization at the same time or very close thereto to the time that I left the organization.

Q. What was your impression as to their attitude concerning these problems and their attitude toward your complaining about these problems?

A. Dr. Pearle's attitude was one that he was very much in sympathy with me and felt that I was correct in my judgment. Dr. Carp's attitude was one that, "Well, let's not get too upset. Things will be better later," and things did not become better later. So Dr. Pearle and I both severed our partnerships at about the same time.

There may be a difference of a few days to as much as maybe a month, but we both left the organization within the same period of time.

Q. You may have stated this earlier, but I just wanted to make it clear. At the time you left for Arizona, were you personally in favor of no restrictions on price advertising?

A. Very much so.

Q. Why was that?

A. Because I felt any restrictive measures that took place, whether it be on advertising or anything else, would serve as a detriment. We had a building organization, and it's common knowledge I openly fought passage of legislation in Austin that would have in my personal opinion at that time, had it passed, would have hurt my organization.

Q. Would it be accurate to say that you have done a complete turnaround now in your personal feelings?

A. Yes. No question about it.

Q. Why is that?

A. I initially when I went into optometry and when I practiced optometry in Massachusetts did not practice as a commercial practitioner, if you want to use that word. I did not advertise price. I didn't believe in price advertising. I went into price advertising in Texas not because I particularly wanted to, but because I needed to put food on the table. I spoke with Dr. Rogers and his brother over in Fort Worth one evening about employment, which you may or may not remember, Dr. Rogers, and I just felt that if this is the way it had to be, it had to be. In those days, many many men were practicing in jewelry stores. This was something that had been the mode in Massachusetts, but had been legislated so that the pratitioners there did not advertise price when I was there. They did not practice in jewelry stores, and I wasn't acquainted with that type of practice. But in order to make a living, I had to.

Q. Do you know whether or not Lee Optical is still owned by Dr. Ellis Carp now?

A. No, I don't know that for certain.

Q. You don't know, so you don't know who owns it?

A. No, I don't.

Q. Do you know who owns Daltex Laboratory?

A. No, I don't know.

MS. PRENGLER: That's all.

A. For certain, I don't.

MS. PRENGLER: That's all the questions I have.

EXAMINATION BY MR. KEITH:

Q. Dr. Shannon, you support price advertising so long as it is fairly done and done in a way that assures the patient actually receives what is advertised?

A. Yes.

Q. You think that such advertising with proper constraints advances the interest of the patient?

A. The interest of the patient? You better phrase it again. I don't understand you.

Q. The patient is better off on account of having the benefit of legitimate advertising?

A. Let me put it this way. I feel that I have no objections to price advertising provided there are restraints so that the patient is not going to be bilked.

Q. Let's call that legitimate advertising.

A. All right.

Q. Then you think that is in the best interest of the patient?

A. No, I don't say that is in the best interest of the patient, but I say I have no objections to price advertising. If advertising is to be, I have no objections to price advertising provided that the patient is not taken advantge of by false or misleading forms of bait advertising, which have occured in the past. I also feel that the patient should have a quality control placed upon the maker of the glasses or the dispenser of the glasses so that they are not going to be bilked in terms of quality. That's why I say I think the Texas statute as it reads now is an excellent one.

Q. Now, do you feel the same way, whether that advertising is by optician or by optometrist?

A. No, I do not. I feel that glasses are strictly a commodity, and as such, should be advertised not by a professional, but by a merchant.

Q. Why if an optometrist is selling this commodity do you oppose his advertising its price fairly?

A. I don't consider that he is selling a product. I consider that the product is part of the overall services that the optometrist is rendering to a patient, and that his fee for the services of the ophthalmic goods is but a small part of the overall fee charged to the patient.

Q. What then is your objection to the advertisement legitimately of the fee for services rendered by an optometrist?

A. I don't know how in the world you can come up with an answer to that.

Q. Why isn't the patient entitled to the information as to what the normal fee for an eye examination is by a professional man?

A. I have no way of knowing what a normal fee is, no more than I have of knowing what a normal examination is.

Q. Do you have a standard and customary fee for an eye examination?

A. No, I do not. I have a minimum fee.

Q. What would be wrong with your advertising legitimately that minimum fee?

A. I don't believe in it because I can't give that

minimum fee to all patients.

Q. Do you have any other reason?

A. I just feel that it's wrong for a professional man to advertise a price. I have nothing against him advertising provided that it's not something that he's putting into a marketplace. I didn't go through college to become a merchant. I was one, not because I wanted to be, but through economic necessity.

Q. What other reasons do you have for opposing the advertisement of professional services, legitimate advertising of professional services?

A. What other objections do I have?

Q. Other than --

A. To legitimate advertising by a professionalist?

Q. With respect to his fee for services rendered?

A. I don't feel that a professionalist, lawyer, physician or anyone else can truthfully and honestly without any equivocations tell everybody that they are advertising to, that "this is my fee."

Let me ask you a question. Would you as an attorney advertise for twenty-five dollars that you will grant a divorce fee, that your fee for a divorce is twenty-five dollars?

Q. I am not going to get into a diatribe. I may say to you that I do not customarily obtain divorces, and my divorce experience has been that I would not normally obtain one for twenty-five dollars.

A. Thank you, sir.

Q. If a legitimate optometrist practicing his profession in accordance with the law desire to establish a set fee for examination, whether it's of a child or an adult or for contacts or bifocals or whatever, what opposition do you have and what reasons do you have which would oppose his advertising that fee which he chooses to set?

A. Go ahead.

Q. Which he will choose to charge the patient?

A. Again, I do not feel that the services that a professional man grants to a patient should be advertised because I don't know that he can truthfully and honestly perform that services for that fee that he is advertising in all cases.

Q. Assume that he can. Assume that he says all children's examinations under twelve years old will be ten dollars regardless of the complexity of the examination. He fairly charges ten dollars for that exam. Then what opposition do you have to his advertising that price?

A. I feel that he is degrading the profession, whatever the profession.

Q. Whether it's law, medicine or dentistry?

A. I secondly feel that the quality of professionalists will suffer at the college level.

Q. What do you mean by that?

A. I don't know that you are going to be able to attract as good a quality individual to become that doctor, whether he be a doctor of law or doctor of medicine, when you have open advertising.

Q. Have you observed any study that would support that opinion?

A. No, sir, I have not. You have asked me for an opinion, and I have given it to you.

Q. Do you have any factual basis for it other than just your own --

A. Common sense?

Q. Yes.

A. No, sir. I have only common sense.

Q. Did you purchase a practice at Richardson, did I understand?

A. Yes, sir.

Q. And the man had practiced there for some period of time, and you paid some type of money to acquire that practice?

A. Yes, sir. I paid American dollars.

Q. What did you acquire when you purchased that practice?

A. All of the equipment, all the fixtures, all the furnishings and all the records.

Q. Patient records?

A. Yes, sir.

Q. Did you value those items such as you put a certain value on the funiture and fixtures and a certain value on the leasehold improvements and a certain value on the records?

A. Everything except the records.

Q. Did you pay more than just the prescribed value of the furniture and fixtures and leasehold improvements?

A. I don't believe I did.

Q. Did you pay anything at all for the records?

A. No, sir.

Q. Do the records have any value?

A. It's questionable. They may have.

Q. Do patients return to that office for examination who had previously been examined or refracted at that office?

A. Yes, sir.

Q. Do you derive some benefit from those reexaminations or repeat examinations?

A. Benefit in what manner?

Q. As a professional man, do you attract, realize some clientele from that source?

A. Yes.

Q. Had you ever lived at Richardson prior to your acquisition of this practice?

A. No, I have not. I beg your pardon. I lived there six months.

Q. But had you engaged in any optometric practice at Richardson?

A. No, sir.

Q. And you do not live there now?

A. No, I do not.

Q. How long have you lived in Bridgeport?

A. I believe it was October 10th of 1975 that I moved there.

Q. Prior to that you lived where, at Richardson?

A. At Richardson.

Q. Then having bought and operated that practice for several years, you then sold it?

A. Yes, sir.

Q. Did you sell it for more than you purchased it?

A. No, sir, I did not.

Q. The same thing?

A. I sold it actually for less.

Q. Did you sell the same equipment?

A. I sold more equipment.

Q. For less money?

A. Yes, sir.

Q. And retired from the practice of optometry?

A. No. I won't say that I have retired entirely. I said for all practical purposes I have retired, and as I explained to Dr. Rogers earlier, I do see occasional patients. I am there on a consulting basis, but my desires are that I will back out of that practice in its entirety.

Q. Do you have some contract to stay there a certain number of months or weeks or years?

A. No, sir, I do not.

Q. Is it a two-man office?

A. When I am there it is, yes.

Q. Is your name on the door?

A. Yes, it is.

Q. What is the name of the firm?

A. There is no firm.

Q. Are you an independent practitioner, that is, you and this fellow Sparks have no partnership?

A. That is correct. All monies that come into that office go to Dr. Sparks. I receive nothing for the services that I render to that office or to him.

Q. What about if you examine a patient and prescribe a set of contact lens; do you realize anything from it?

A. I realize nothing.

Q. Whether you do or do not work, you don't get any money?

A. That is correct.

Q. Do I understand --

A. I beg your pardon. This has been that way since September 1 of 1975. So this is not something that occurred yesterday or the day before.

Q. Do I understand that it was your opinion that advertising of services leads to a high volume of practice?

A. No. Advertising of merchandise.

Q. Leads to a high volume of practice by associated optometrists? Is that what Mr. Niemann asked you?

A. It has worked that way, it sure has.

Q. And that a high volume practice by an optometrist is undesirable?

A. No, I did not say that.

Q. Well, what, then, is undesirable about advertising if it leads to a high volume practice?

A. Of optometry or opticianry?

Q. Optometry.

A. Of optometry, I think much depends upon the amount of time that the individual optometrist is able to spend with the patient and the services that he is able to render to that patient. There is not a thing in the world against having a high volume optometric practice that is devoted exclusively to refracting, provided that the optometrist is able to give an honest and a true service to that patient.

Q. So the mere fact that advertising may lead to a high volume practice is not in and of itself bad?

A. No, sir. I am not saying that it is. I am not against advertising.

Q. And not against a high volume practice if it is performed properly?

A. That's correct.

Q. Reputation can lead to a high volume of practice?

A. Can it?

Q. It can?

A. Tell me where.

Q. Certainly that's true in any other profession. It's not true --

A. Is it true with Dr. Rogers?

Q. Is it true in your profession, a reputation will not affect your volume of practice?

A. Certainly it will, but it will not lead to a high volume of practice.

Q. What is a high volume?

A. That's what I am asking you.

Q. You used that term throughout your direct examination. What did you mean when you used the term?

A. Anything over half a million a year.

Q. Is a high volume practice?

A. I would consider so.

Q. You are talking about a half million dollars a year in gross fees?

A. Yes, sir, gross volume.

Q. Fees by an optometrist?

A. No. I am speaking in terms of total sales.

Q. Of what?

A. Of an office, of a dispensary or an optometric office.

Q. Wherein both examination is performed and product is dispensed?

A. If it's an optometric office, then the answer would be yes; if it's strictly a merchandise that is being sold, it would be an opticianry office, and we felt and I feel that any office that does in excess of half a million dollars is a high volume practice.

Q. All right. Now, is any office that does as much as half a million dollars a year necessarily bad in your view?

A. Bad?

Q. Yes.

A. What do you mean bad?

Q. Is there some consequence that flows from that that will service the patients who seek attention at that office?

A. Volume in itself is not the answer.

Q. You might have six optometrists rendering that service?

A. Or six opticians, depending upon whether you have an opticianry establishment.

Q. Depending upon the nature of the facility?

A. Certainly.

Q. There is also in your profession, as well as the others, the advent of the para-professional, is there not?

A. Yes.

Q. And this can result in a wise and expeditious employment of professional time. The para-professional can be trained to assist the professional man in his provision of service?

A. True.

Q. And this is one way that each of the professions has attempted to provide greater care at a lesser cost?

A. Possibly.

Q. Is that true in your profession?

A. On a limited scale it's true. I think more in medicine.

Q. You mean you are not claiming the benefit of it?

A. I haven't seen too many practical applications of it. You are asking me something that I know, and I am only telling you what I truly know.

* * *

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FURTHER EXAMINATION BY MS. PRENGLER:

Q. Dr. Shannon, when you were with Lee Optical and you had optometrists there, did each of them have their own examining room?

A. Or rooms, yes.

Q. How would they know when a patient had come in? For example, how would they know if a patient was waiting to be examined while they were examining another patient?

A. No. They would have no way of knowing. The girl

would usually knock on the door and advise the doctor by using a code or in some cases say, "You have got another patient," or "You have got a number of patients waiting," some such thing as that.

Q. But that would happen while they were examining one patient. They would have some sort of interruption to let them know that some other patient was waiting?

A. Or it could conceivably occur as soon as they got finished with that one patient, she would say, "Doctor, you have got five more patients waiting."

Q. But for the most part, did most of your optometrists stay pretty busy?

A. Yes.

Q. One more question. In the profession of optometry there are many tasks that a para-professional could perform. When you get down to examining eyes, is there anything that you can let someone else do who was not an optometrist?

A. Yes.

Q. What would that be?

A. Oh, they could take blood pressure, for example, if they are qualified and trained properly by the optometrist. That would be one. In my office they do all the preliminary work. We give them a basic case history card, and they fill it out, put the name and address and so forth.

Q. But in terms of actually examining the eyes?

A. Examining the eyes, no. The only thing they do is

run a visual skill, and they do a color vision test.

MS. PRENGLER: That's all I have.

FURTHER EXAMINATION BY MR. NIEMANN:

Q. Doctor, I would like to turn your attention for the moment to advertising professional services that Mr. Keith discussed with you. If patients are gained through a reputation of confidence in contrast to advertising, does that encourage competence and quality of eye care?

A. Yes. If the patients are gained by word of mouth advertising, I think it's far better than other forms of advertising.

Q. The flip side of the coin, if the patients are gained for the most part by advertising price or otherwise, does that tend to deemphasize the importance of competency of the optometrist and the importance of quality of eye care?

A. Yes. I would say there are three basics. One is that if an individual sees more patients, he is going to have to either increase the time that he keeps his office open, and for the same examination time, or if he keeps the same hours, he is going to have to cut short his examination.

Number two, the quality of the product will not be as good for the most part as it would be if he had unlimited time to give to the patient in terms of quality control and services that he personally might be able to render rather than having somebody else render.

Q. Such as verification of lenses?

A. Yes, fitting of the spectacles themselves, even to the insertion and fitting of a pair of contacts and so forth.

The third thing is that if he maintains the same fee scale and he sees more patients, he is either going to have to extend his period of time, and if he does that, then he finds himself in a point of diminishing returns. He is putting in longer and longer hours all the time. So the chances are he is going to cut corners any way that he can, and he is going to cause that individual to pay the advertising rate or whatever he has spent for advertising.

Q. In short, the advertising has to be paid by higher prices or greater volume with shortened time devoted to the patient?

A. That's the only logical way I can see it, regardless of what product you are selling.

Q. Doctor, next I would like to discuss with you a moment the effect of price advertising before and after the advent of Shaunbaum's outfit coming to Arizona. As I recall, did you testify that approximately ninety-eight percent of your sales were at the non-advertised prices in Arizona?

A. Yes. I think I said that that was true in Texas. In Arizona it was a similar figure. So the bulk of the patients paid more than our advertised price. That's what I am trying to say.

Q. Before Dr. Shaunbaum's price advertising came to Arizona, you did not advertise price, is that correct?

A. That's correct.

Q. Simply advertising without price, without reference to price?

A. Yes.

Q. After you were forced into price advertising by the competition of Dr. Shaunbaum's operation in Arizona, what effect did that price advertising have on the ninety-eight percent of your sales that did not conform to the advertised prices?

A. We increased our prices shortly after we started advertising price in the non-advertised price categories. A pair of glasses that we would have dispensed prior to price advertising at, we will say, sixteen dollars, were now increased to, we will say, seventeen dollars. So the patient actually paid more for the same product now that we were advertising price than what they had paid prior to it.

Q. Was the reason, that you had to make up the deficits on the two percent?

A. Yes. Well, the prime reason was that we had to pay the advertising bill, which was the increased cost of operation. They much prefer to go up the ladder. Nobody likes to go down the ladder, in my opinion. If you are accustomed to making a certain livelihood and now suddenly your practice is not as profitable as it has been for you, you are going to try to find out why and take whatever remedial measures are necessary to correct this thing. This was the procedure we followed in Arizona, is that we found that we got into a much greater advertising program after Mr. Shaunbaum had opened his operations in Arizona than what we had done prior to that time. Our advertising costs tripled, but our volume did not triple.

So, to offset this, we increased the prices of the services, products that we were selling.

Q. Are you telling me that price advertising had the effect of increasing prices for ninety-eight percent of the people?

A. Yes, that's exactly what I said, by a dollar in some cases and maybe two dollars in others.

MR. NIEMANN: No further questions.

FURTHER EXAMINATION BY MR. KEITH:

Q. Was there any other cost factor involved that led to your increased prices?

A. Was there any other factors involved?

Q. Cost factor involved that led to increased prices?

A. No, nothing.

Q. What year was this price increase?

A. It started in, I would say, the latter part of 1958 or the early part of 1959.

Q. The advertising?

A. Sir?

Q. The advertising?

A. Of price.

Q. Right. When did you impose the increase?

A. I would say within a period of two months we received monthly financial profit and loss statements, and I believe it was after we had received our second profit and loss statement that

the increase in the retail price of spectacles --

Q. I thought you testified earlier, Dr. Shannon, that you did not increase your prices, but continued to deliver the same service to the patient at the same price, but experienced a six percent decline in your net profit.

A. That is absolutely right. For two months we sure did.

Q. Then you raised the price?

A. Yes, right.

MR. KEITH: That's all I have. Thank you.